IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

No. 72-914

SARAH SCHEUER, Administratrix of the Estate of Sandra Lee Scheuer, Deceased,
vs. Petitioner,
JAMES RHODES, Governor of the State of Ohio, SYLVESTER DEL CORSO, Adjutant General of the Ohio National Guard, ROBERT CANTERBURY, Assistant Adjutant General of the Ohio National Guard, HARRY D. JONES, a Major of the Ohio National Guard, JOHN E. MARTIN, and RAYMOND J. SRP, Captains of the Ohio National Guard, and ROBERT WHITE, President, Kent State University, Respondents,

and

No. 72-1318

ARTHUR KRAUSE, Administrator of the Estate of Allison Krause, Deceased,
vs. Petitioner,
GOVERNOR JAMES RHODES, et al.,
and Respondents,
ELAINE B. MILLER, Administratrix of the Estate of Jeffrey Glenn Miller, Deceased,
vs. Petitioner,
JAMES RHODES, Governor, et al.,
Respondents.

ON WRIT OF CERTIORARI

TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR RESPONDENT JAMES A. RHODES

(Continued Inside Front Cover)

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BRIEF OF RESPONDENT JAMES A. RHODES

OPINIONS BELOW

The consolidated Memorandum Opinion and Order of the United States District Court for the Northern District of Ohio, Eastern Division, in the *Krause* case (C 70-544),

the *Miller* case (C 70-816) and the *Scheuer* case (C 70-859) has not been printed. It appears in the Appendix of the *Krause-Miller* Petition for Certiorari at pages 34-46.[1]

The Sixth Circuit Court of Appeals also treated the three cases in one opinion. It is officially reported in 471 F. 2d 430 (1972). Also, it is printed in the Appendix of the *Scheuer* Petition for Certiorari at pages 1a-69a.

JURISDICTION

This Court granted a Writ of Certiorari on June 25, 1973, to review the decision of the Sixth Circuit Court of Appeals in the *Krause* and *Miller* cases (No. 72-1318). On the same date, on a separate Petition, a Writ of Certiorari was likewise granted in the *Scheuer* case (No. 72-914). Jurisdiction of this Court was invoked in both Petitions under Title 28, U.S. Code, §1254(1).

By permission of the Clerk of this Court, under date of July 18, 1973, Respondents herein were authorized to respond to the *Krause-Miller* brief and the *Scheuer* brief by filing one brief in answer to both. Also on July 18, 1973, the Clerk advised that the time for filing briefs in behalf of the Respondents had been extended to and including October 10, 1973. Respondent James A. Rhodes herewith files his separate brief on the merits. Other respondents are filing a joint brief.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. United States Constitution, Amendment XI:

"The Judicial Power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by citizens of another State. . ."

1. Herein, "Kr. Br." will refer to Krause-Miller brief; "Sch. Br.", to Scheuer brief; "Kr. Pet.", to Krause-Miller Petition for Certiorari; "Sch. Pet." to the Scheuer Petition; "App." to Joint Appendix in Krause-Miller cases, and "Sch. App." to the Scheuer Appendix.

2. Section One of the Civil Rights Act of April 20, 1871, 17 Stat. 13, 42 U.S.C. §1983:

> "Every person who, under color of any statute, ordinance, regulation, custom, or usage of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress."

3. Jurisdiction in the United States District Court was invoked under 28 U.S.C. §1343(3) and (4):

> "The district courts shall have original jurisdiction of any civil action authorized by law to be commenced by any person: . . . (3) To redress the deprivation, under color of any State law, statute, ordinance, regulation, custom or usage, of any right, privilege or immunity secured by the Constitution of the United States or by any Act of Congress providing for equal rights of citizens or of all persons within the jurisdiction of the United States; (4) To recover damages or to secure equitable or other relief under any Act of Congress providing for the protection of civil rights, including the right to vote."

4. Ohio Revised Code §5923.21 (officially set forth in Page's Ohio Revised Code Annotated, Title 59, at page 65:

> "The organized militia may be ordered by the governor to aid the civil authorities to suppress or prevent riot or insurrection, or to repel or prevent invasion, and shall be called into service in all cases before the unorganized militia."

5. Ohio Revised Code §5923.22 (officially set forth in Page's Ohio Revised Code Annotated, Title 59, 1972 Supplement at p. 24):

> "When there is a tumult, riot, mob, or body of men acting together with intent to commit a felony, or to

do or offer violence to person or property, or by force and violence break or resist the laws of the state, the commander in chief may issue a call to the commanding officer of any organization or unit of the organized militia, to order his command or part thereof, describing it, to be and appear, at a time and place therein specified, to act in aid of the civil authorities. No officer or enlisted man in the organized militia, shall refuse to appear at the time and place designated when lawfully directly to do so in conformity to the laws for the suppression of tumults, riots, and mobs, or shall fail to obey an order issued in such case."

QUESTIONS PRESENTED

1. A. Whether a United States District Court is required to take a complaint's allegations as true when deciding a Rule 12(b)(1), Fed. R. Civ. P. Motion to Dismiss.

   B. Whether a United States District Court is required to take a complaint's allegations as true when deciding a Rule 12(b)(6), Fed. R. Civ. P. Motion to Dismiss.

2. Whether an action brought in a United States District Court under Sec. 10 of the Civil Rights Act of 1871, 17 Stat. 13, 42 U.S. Code, §1983, against the Governor, designated as such, and other officers of the State of Ohio, which specifically charges him with issuing official orders resulting in deprivation of Constitutionally secured rights, and which demands money damages from him personally, is an action against the State of Ohio and by reason thereof, prohibited by the Eleventh Amendment to the United States Constitution.

3. Whether there is a doctrine of unqualified executive immunity that shields the Governor from

personal liability for deprivation of rights secured by the United States Constitution, and if so, whether such doctrine, in an action brought against the Governor under 42 U.S. Code, Sec. 1983, authorizes the dismissal of complaints charging intentional, reckless, willful and wanton actions resulting in deprivation of Constitutionally secured rights upon the Court's judicially noticing facts in rebuttal to such allegations.

4. Whether causes of action asserted in the complaints under diversity jurisdiction and claimed to be derived from Ohio Revised Code Section 5923.37 reach to Respondent James A. Rhodes. (Discussed under Questions 2 and 3 in this brief.)

5. Whether the acts of a Governor in issuing orders to his State's National Guard are shielded from judicial review for the reason that any challenge of such acts presents a non-justiciable political question.

6. Whether the Federal Government is an indispensable party to the adjudication of Petitioners' allegations concerning the training and weaponry of the Ohio National Guard.

STATEMENT OF THE CASE

The *Krause, Miller* and *Scheuer* complaints filed in the District Court, in substance, allege that the Governor, the Adjutant General, the Assistant Adjutant General and other officers and men of the Ohio National Guard, acting individually and in conspiracy under color of state law, ordered untrained troops with loaded weapons onto the campus of Kent State University on May 4, 1970 and through their intentional actions, involving deprivation of constitutionally secured civil rights, three students,

Allison Krause, Jeffrey Miller and Sandra Scheuer, were shot and killed. The complaints specifically allege that Respondents intentionally violated the decedents' constitutional rights and that the shooting was the result of willful, wanton, and malicious plans and actions brought about by individual and conspiratorial conduct of the Respondents.

Neither Respondent Rhodes nor the other Respondents filed answers in any of the cases. Instead, they filed a Motion to Dismiss on grounds of provisions of Rule 12(b)(1) and 12(b)(6). Attached to the Motions to Dismiss were copies of proclamations issued April 29, 1970, calling out the Ohio National Guard and one issued May 5, 1970 in supplement to the April 29 proclamation. The Motion to Dismiss was granted by the District Court on June 2, 1971. *Scheuer* separately appealed and *Krause and Miller* jointly appealed to the United States Court of Appeals for the Sixth Circuit. That Court, like the District Court, treated the cases together in reaching judgment and writing its opinion.

Both the District Court and the Sixth Circuit Court of Appeals held that these actions for money payments to the estates of the students whose civil rights were asserted to have been violated, were, in actuality, actions against the State of Ohio and by reason thereof, barred by the Eleventh Amendment. The Sixth Circuit Court of Appeals also held that even if the cases could be treated as one against individuals, the Defendants-Respondents enjoyed executive immunity, unqualified in the case of Respondent James A. Rhodes, Governor, and qualified with respect to the other Respondents. In the Sixth Circuit, a dissent was written by Judge Celebrezze, and the majority opinion was written by Judge Weick.

SUMMARY OF ARGUMENT

In each of the three cases here involved, upon the filing by Respondents of the Motions to Dismiss for lack of subject matter jurisdiction and for failure to state a claim upon which relief could be granted, the District Court had before it not only the allegations of the complaints, but also the facts contained in the gubernatorial proclamations attached to the Motions to Dismiss and facts of which the District Court itself takes judicial notice. There is no requirement in law that upon the filing of a Motion to Dismiss, the Court must accept all allegations of the complaints as true. It may treat the allegations as rebutted or modified by other facts before it for consideration.

If an action brought against the Governor or other officer of a state, is one in which the relief sought would affect such an essential operation of state government as maintaining public tranquility and order, the action is, in substance, an action against the sovereign state and is, therefore, barred by the Eleventh Amendment. An action to collect money damages from an ex-Governor of a state, charging a deprivation of federally secured constitutional rights by his ordering units of the National Guard to aid civilian authorities maintain order would effectively prevent free exercise of independent judgment by successor governors and would, by that means, affect essential governmental functions.

A governor who has qualified to perform the duties of his office by swearing to support the Constitution of the United States and the Constitution of Ohio and faithfully to execute the laws may, in the conduct of his office, call out his state's National Guard to aid civilian authorities in preserving or restoring public tranquility and order, and may, for that purpose, as Commander-in-Chief, authorize the Adjutant General and subordinate commanders to make decisions with respect to the deploy-

ment and use of troops without giving rise to a right of judicial review of the call-up or subsequent orders. The Governor's official, discretionary acts are protected by unqualified executive immunity against causes of action arising under 42 U.S. Code, §1983, or under the diversity jurisdiction of the federal courts.

The complaints herein, to the extent that they charged improper training, arming and procedures of the Ohio National Guard, raised political questions that are not justiciable. Furthermore, allegations that the training, arming and procedures of the Ohio National Guard were improper indispensably require joinder of the United States of America as a party-defendant. Failure to join an indispensable party requires dismissal of the action. As the United States has not consented to be sued, dismissal is requisite.

ARGUMENT

I. ON MOTIONS TO DISMISS THE COMPLAINTS, THE DISTRICT COURT CORRECTLY MEASURED ALLEGATIONS OF THE COMPLAINTS AGAINST FACTS CONTAINED IN THE GOVERNOR'S PROCLAMATIONS ATTACHED TO THE MOTIONS AND AGAINST FACTS OF WHICH THE COURT TOOK JUDICIAL NOTICE.

In the *Krause-Miller* brief, the first question treated in Argument is stated as follows:

> "On a defendant's motion to dismiss a complaint based solely upon the sufficiency of the allegations of that complaint, may a trial or appellate court assume as true factual matters which are contrary to the allegations of that complaint?"

In the *Scheuer* brief, counsel have elected to treat first in Argument their third question, stated as follows:

> "Whether a United States district court, pursuant to Rule 8 of the Federal Rules of Civil Procedure, when

deciding a motion to dismiss a complaint based solely on the sufficiency of its allegations, is required to take its allegations as true."

The *Krause-Miller* brief devotes most of its bulk to pointing out recitals in the Sixth Circuit's majority opinion that do not square with allegations of the *Krause* and *Miller* complaints; to similar recitals from Judge O'Sullivan's concurring opinion; to materials claimed to rebut such recitals, some of which are asserted to be from "official" sources (but none of which is contained in the record of the Krause, Miller or Scheuer cases); and to citing three cases claimed to hold that the district court, no matter what, in considering a motion to dismiss, is obligated to accept as true any allegations in a complaint.[2]

The brief filed herein by Charles E. Brown, Robert F. Howarth, Jr., and William W. Johnston, for Respondents Del Corso, Canterbury, Jones, Martin, Srp, and White starts its Argument by treating the question whether a district court is required to accept the allegations of a complaint as true in deciding a motion to dismiss. In doing so, it separates the question into individual treatments of Motion to Dismiss under Rule 12(b)(1) and 12(b)(6), Fed. R. Civ. P.

Respondent Rhodes adopts the argument offered in the brief of the other Respondents. His own motion to dismiss in the *Krause* case was based on both 12(b)(1) and 12(b)(6) grounds, and his motions to dismiss in the *Miller* and *Scheuer* cases were based on Rule 12(b)(1) and on the further ground that it "affirmatively appears that any act or omission on the part of Governor James A. Rhodes***was remote from the injury to and death of

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2. *Collins v. Hardyman*, 341 U.S. 651 (1951); *Ickes v. Virginia Colorado Development Corp.*, 295 U.S. 639 (1935); *Ickes v. Fox*, 300 U.S. 82 (1937).

plaintiff's decedent, and was separated therefrom by a substantial intervening cause."

The District Court rested its order of dismissal on the 12(b)(1) ground of lack of subject matter jurisdiction (Eleventh Amendment) but spoke also about Executive Immunity, which reflects the 12(b)(6) ground of failure of the *Krause, Miller* and *Scheuer* complaints to state a claim upon which relief could be granted (Executive Immunity).

The *Scheuer* Argument, by citing Rule 8 Fed. R. Civ. P. (Sch. Br. 13), states reliance thereon for its contentions that "the allegations of a complaint in federal court must be taken as true for purposes of a motion to dismiss" and "must be construed liberally in favor of the pleader at that stage***." Actually, only Subsection (f) of Rule 8 is cited in support. It reads:

> "All pleadings shall be so construed as to do substantial justice."

A more pertinent subsection would be Rule 8(d), which states in its first sentence:

> "Averments in a pleading to which a responsive pleading is required, other than those as to the amount of damage, are admitted when not denied in the responsive pleading."

Thus, not even Rule 8(d) supports the contention that a federal court, in every case, must take the allegations of the complaint as true when considering a motion to dismiss. Such a motion, under Rule 12, Fed. R. Civ. P., can be the device for raising the 12(b)(1) and (6) defenses.

There is, therefore, nothing in Rule 8, Fed. R. Civ. P. that requires a district court, on consideration of a Rule 12(b)(1) motion, to treat the allegations of the complaint as admitted or otherwise true. This permits the district court to set aside allegations carelessly or

cynically made with no real hope of proof for the tactical purpose of avoiding more accurate statements that would defeat the cause of action. Certainly, there is no requirement in Rule 8, or anywhere else, that on a Rule 12(b)(1) motion to dismiss, the court must believe the unbelievable and act as if it were fact.

In this connection, it should be noted that Sarah Scheuer's counsel recited in his "Statement of the Case" in his Petition for Certiorari (Sch. Pet. 5):

> "As a consequence of an investigation conducted ***by petitioner's counsel, petitioner commenced this action in the district court***."

The same counsel then alleged in her complaint, conjunctively, that "Defendant Rhodes, intentionally, recklessly, willfully and wantonly***" engaged in certain conduct. (Sch. Pet. 87a.) However, counsel has now, in his Argument, receded from that extreme allegation and instead has rephrased his allegation in the disjunctive, as follows:

> "***the first claim in this case alleges that the defendants acted either 'intentionally, recklessly, willfully' [or] . . . . wantonly." (Sch. Br. 8.)

In support of its contention that the allegations of a complaint in federal court must be taken as true for purposes of a motion to dismiss, the *Scheuer* brief cites five cases (Sch. Br. 13), *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957); *Cruz v. Beto*, 405 U.S. 319, 323 (1972); *Haines v. Kerner*, 404 U.S. 519 (1972); *Jenkins v. McKeithen*, 395 U.S. 411, 423-424 (1969); and *Walker Process Equipment, Inc. v. Food Machinery and Chemical Corp.*, 382 U.S. 172, 174-175 (1965). None is a case involving a Rule 12(b)(1) motion to dismiss for lack of subject matter jurisdiction. Therefore, all are irrelevant to the 12(b)(1) aspects of the motions to dismiss the

complaints of Krause, Miller and Scheuer filed herein by Respondent Rhodes. Similarly, the citation of the treatise, *Moore's Federal Practice*, with the designation of Section 12.08 at pages 2265-67 as the pages to read (Sch. Br. 13), has an equal irrelevance. That section is concerned with "Motion to Dismiss for Failure to State a Claim", which is a 12(b)(6) motion (Sch. Br. 13).

Counsel for Sarah Scheuer has also cited (Sch. Br. 14) "*2A Moore's Federal Practice*", Section 12.16 at page 2352 as suggesting that even if a motion to dismiss is filed under Rule 12(b)(1) directed to the subject matter jurisdiction of the court, and if such motion involves "disputed factual issues", the court must hold a preliminary, evidentiary hearing to resolve the issue of jurisdiction. Professor J. W. Moore has not said so. The most he has said is that by provision of Rule 12(d), Rule 12(b)(1)-(7) motions shall be heard and determined before trial upon application of any party, and that "certainly it will be advisable generally to decide such defenses as lack of jurisdiction over the subject matter*** promptly after they are raised, and not defer them to the trial." (*2A Moore's Federal Practice*, 2352.) This is on the theory that determining lack of subject matter jurisdiction promptly may make a trial unnecessary.

The *Scheuer* brief lists three cases for examination on this point (Sch. Br. 14): *Sanial v. Bossoreale*, 279 F. Supp. 940 (S.D. N.Y. 1967); *Smith v. Sperling*, 354 U.S. 91 (1957); and *United States v. Cigarette Merchandisers' Association*, 18 F. R. D. 497 (S.D. N.Y. 1955). All are cited in a note to the quotation just given from *2A Moore's Federal Practice*, page 2352, and they are no stronger in support of the Scheuer claim that she should have been provided opportunity to produce rebuttal evidence than Professor Moore's statement itself.

The *Scheuer* brief concludes its Argument that on a motion to dismiss, a district court is required to take the

allegations of a complaint as true by appraising the factual context in which the events recited in the *Scheuer* complaint are alleged to have taken place. (Sch. Br. 14.) It suggests that this court read certain cases.[3] Respondent Rhodes was not a party in any of the cases cited and had no opportunity to challenge the purported "facts" produced therein. Further, the *Scheuer* brief hints that much can be learned from "facts" that it anticipates will show up in briefs filed by *amici curiae*. The *Scheuer* brief complains (Sch. Br. 15) that Respondent Rhodes did not attach "sworn facts" to his motion to dismiss and that their lack forbids acceptance of the motion as a "speaking" motion for summary judgment. Suffice it to say that the proclamations attached were official governmental documents, issued by the Governor of the State of Ohio under the Great Seal of the State of Ohio, attested by the Secretary of State and, pursuant to law, filed with the Secretary of State. Moreover, copies of the same proclamations were attached (and referred to as attached) to the Memorandum in Support of the Motion to Dismiss filed by other respondents in the *Krause* and *Miller* cases, which were before Judge James C. Connell in the district court at the same time as the *Scheuer* case. They were thus pleaded, upon authority of counsel admitted to practice in the district court, on the same basis as other statements in the Motions to Dismiss. In pertinent part, Rule 10(c), Fed. R. Civ. P., provides:

> "A copy of any written instrument which is an exhibit to pleading is a part thereof for all purposes."

We return now to the *Krause-Miller* brief. As has been suggested earlier, its Argument in support of the contention that a district court, in considering a motion to

3. *Hammond v. Brown*, 323 F. Supp. 362 (N.D. Ohio, 1971), aff'd 450 F. 2d 480 (Sixth Cir. 1971); *King v. Jones*, 319 F. Supp. 653 (N.D. Ohio, 1971), rev'd 450 F. 2d 478 (Sixth Cir. 1971); Court of Appeals judgment vacated and remanded to District Court for dismissal for mootness, 415 U.S. 911 (1972).

dismiss a complaint must take the allegations of the complaint as true, is devoted mainly to recitations of what counsel describes as "facts" attending the events alleged in the *Krause* and *Miller* complaints. (Kr. Br. 18-27.) Some of it is in the popular art form of "leaks from official sources" that have been given the appearance of truth through publication in the *Congressional Record.* Counsel has been careful to warn (Kr. Br. 27) that

> "Petitioners are not presenting this material as necessarily positive or admissible proof of the truth of their allegations. This material is presented for the sole purpose of demonstrating the inappropriateness of the actions of the lower courts in refusing to accept as true the allegations of the complaint in reviewing their sufficiency on a motion to dismiss."

The gravamen of counsel's Argument is that if the district judge and a majority of judges in the Court of Appeals were going to take judicial notice, they should have taken judicial notice of facts as *Krause-Miller* counsel would have them seen, in retrospect. To assist, counsel portrays a warped and distorted representation of events attending the tragic deaths at Kent State and assumes that such portrayal must inescapably be the source of "facts" of which the judges below took judicial notice. It is far more likely that the experienced jurists below well knew how to separate guesswork and fiction from fact in news media accounts of the Kent State episodes. Likewise, they knew how to discount sensationalism and hyperbole.

The *Krause-Miller* brief cites (Kr. Br. 27) *Sheppard v. Maxwell,* 384 U.S. 333 (1966) and *Rideau v. Louisiana,* 373 U.S. 723 (1963) as authority for the proposition that "this court has condemned the undue saturation of biased

news media exposure in a community where a defendant is faced with a criminal charge". It should be noted that in both cases, the facts were tried by juries, also that Justice Black, who wrote the opinion for the Court in the *Sheppard* case, dissented (and was joined by Justice Harlan) in the *Rideau* case. The point of his dissent was that "unless the adverse publicity is shown by the record to have fatally infected the trial, there is simply no basis for the Court's inference that the publicity***called up some informal and illicit analogy to res judicata, making petitioner's trial a meaningless formality." (373 U.S. 723 at 729.)

In the view of the *Krause-Miller* brief, "If juries must decide issues of fact solely upon admissible evidence, the courts too must shun the influence of the media in determining the legal sufficiency of complaints." (Kr. Br. 28.) Cited in support of this proposition is a quotation from the concurring opinion of Justices Cardozo and Stone in *Borden's Farm Products Co. v. Baldwin*, 293 U.S. 194 (1934). The case seems inapropos. It was one in which an injunction was sought on Fourteenth Amendment grounds against enforcement of a law enacted by the Legislature of New York to set retail prices for milk on a basis that allowed a higher sale price to small dairies than to those with a "well-advertised trade name". Defendants moved to dismiss the complaint upon the grounds that it failed to state a cause of action in equity and that the statute was constitutional. Affidavits were presented on both sides and the case was heard on the motion for injunction and the motion to dismiss. Dismissal by the three-judge district court was reversed by the Supreme Court. The opinion in the case, written by Chief Justice Hughes, contained this language (293 U.S. 194 at page 204):

"In view of the peculiar nature and effect of this provision [discrimination in price], and of the novel and important constitutional question that it presents, we think that the complaint should not have been dismissed for insufficiency upon its face, and that the plaintiff is entitled to have the case heard and decided with appropriate findings by the trial court; unless it satisfactorily appears, upon facts of common knowledge or otherwise plainly subject to judicial notice, that the provisions should be sustained as resting upon a rational basis consistent with constitutional right."

Summing up, the motions to dismiss the *Krause, Miller* and *Scheuer* complaints on Rule 12(b)(1) grounds for lack of subject matter jurisdiction empowered the district court to render summary judgment based upon facts, but not conclusions, alleged in the complaints to the extent they were not rebutted by the proclamations filed as attachments to the Motions to Dismiss and by facts of which the district court and later the Court of Appeals took judicial notice. Similarly, the Motion to Dismiss filed by Respondent Rhodes in the *Krause* case, based additionally, on Rule 12(b)(6) grounds, admitted only the facts well pleaded and not rebutted by facts of which the court took judicial notice, including those contained in and suggested by the official governmental documents, copies of which were attached to the Motion to Dismiss, namely the Governor's proclamations.

II. THE GOVERNOR OF OHIO IS PROTECTED BY UNQUALIFIED EXECUTIVE IMMUNITY AGAINST COMPLAINTS CHARGING THAT HIS OFFICIAL, DISCRETIONARY ACTS GIVE RISE TO A CAUSE OF ACTION UNDER 42 U.S. CODE §1983 OR UNDER THE DIVERSITY JURISDICTION OF THE FEDERAL COURTS.

The *Scheuer* brief begins on this point by acknowledging that there is a doctrine of executive immunity from

suit by virtue of official position. It argues that the doctrine has not been dealt with definitively by this Court and that it lacks the firm underpinning in constitutional history that gives impregnability to legislative and judicial immunity. In addition, the *Scheuer* brief argues that even if there were an immunity from suit for official acts resulting in deprivation of rights protected by the federal Constitution, it is not available to those who exercise ministerial rather than discretionary powers and it is not available at all if the conduct complained of exceeded the scope of office. While the argument is tidier than that presented below on this point, it is no better grounded.

First, with respect to a cause of action filed under 42 U.S. Code §1983, the *Scheuer* brief cites six Courts of Appeals decisions from the 2nd, 5th 6th, 7th and District of Columbia Circuits to support its contention that executive immunity for §1983 actions has been rejected by a majority of the lower courts that have considered the issue. (Sch. Br. 28.) The cases cited are the same as cited in the *Scheuer* brief in support of Petition for a Writ of Certiorari (Sch. Pet. 14). The Brief in Opposition to Certiorari filed by the other Respondents herein dissected the cases and documents that they gave no support to the assertion that there is no executive immunity against an action brought under 42 U.S. Code §1983. (Brief of Respondents DelCorso, et al., opposing Certiorari, 14 and 15.) Respondents' brief also identified a consistent line of cases holding state government officials immune to 42 U.S. Code §1983 actions for discretionary acts done within the scope of authority. So cited were *Hoffman* v. *Halden*, 268 F. 2d 280 (9th Cir. 1959); *Franklin v. Meredith*, 386 F. 2d 958 (10th Cir. 1967); *Lumbermans Mutual Casualty Company v. Rhodes*. 403 F. 2d 2 (10th Cir. 1968), certiorari denied,

394 U.S. 965 (1969); *Silber v. Dickson*, 403 F. 2d 642 (9th Cir. 1968).

This Court has uniformly given the protection of unqualified executive immunity to a governor who calls out the National Guard to put down disorder and insurrection and who issues to the Guard orders to accomplish that end. In dissenting below, Judge Celebrezze conceded:

> "The Supreme Court has consistently ruled that the executive decision to call up the militia is conclusive, and in and of itself is not subject to judicial review. ***With respect to Section 1983 claims, Governor Rhodes' decision to order the National Guard to duty on the Kent State Campus, therefore, could not have been reviewed as a basis for liability." (Sch. Pet. 69a)

Judge Celebrezze was unwilling to concede that the same unqualified executive immunity extended to Governor Rhodes with respect to such additional allegations of the *Scheuer* complaint as that he "engaged in rhetoric and gave Ohio National Guard officers orders which substantially increased the risk of unnecessary violence", and the like. (Sch. Pet. 87a) As has been pointed out *supra*, the district court was under no obligation to accept such allegations as true to the extent they were rebutted by facts of which the court took judicial notice. Similarly, the courts below judicially noticed rebutting laws of Ohio and the United States with respect to training, weaponry, discipline and call-up of the Ohio National Guard.

Like the instant cases, *Moyer v. Peabody*, 212 U.S. 78 (1909) was an action brought under the Civil Rights Act to recover damages from a former Governor (of Colorado) for trespass against the plaintiff. The complaint was dismissed on demurrer. Certiorari was denied and this court speaking by Justice Holmes, said in part:

"As no one would deny that there was immunity for ordering a company to fire upon a mob in insurrection, and that a state law authorizing the governor to deprive citizens of life under such circumstances was consistent with the Fourteenth Amendment, we are of opinion that the same is true of a law authorizing by implication [imprisonment ordered below in this case]." *Moyer v. Peabody*, 212 U.S. 78 at p. 85.

In determining whether it had before it unrebutted allegations that Respondent, Governor James Rhodes, had taken discretionary actions outside the scope of his office or in abuse of his office that deprived the decedents of the plaintiffs below of federally protected constitutional rights, the District Court had before it, incorporated into the various motions to dismiss therein filed, the text of the official gubernatorial proclamations of April 29, 1970, and May 5, 1970, each reciting (to quote the April 29 language):

"I, James A. Rhodes, Governor and Commander-in-Chief of the militia of the State of Ohio, do hereby order into active service such personnel and units of the militia as may be designated by the Adjutant General to maintain peace and order and to protect life and property throughout the State of Ohio; and said Adjutant General and through him the commanding officer of any organization of such militia, is authorized and ordered to take action necessary for the restoration of order throughout the State of Ohio. The military forces involved will act in aid of the civil authorities and shall consult with them to the extent necessary to determine the objects to be accomplished, leaving the procedure of execution to the discretion of the commanding military officer designated by the Adjutant General.

***

I command all persons engaged in riotous and unlawful proceedings to cease and desist from such activities.

The active military duty herein ordered is hereby designated as service in time of public danger." (Sch. Pet. 24.)

The wrongful death claims asserted in the district court in the within cases, based on diversity jurisdiction (28 U.S.C. §1332), are subject to the same rebuttal arising out of Eleventh Amendment immunity to suit as has thus far been discussed herein with respect to the 42 U.S. Code §1983 actions. To minimize repetition, the arguments therefor are referred to and adopted. Moreover, under the rule of *Erie Railroad Company* v. *Tompkins*, 394 U.S. 64 (1938) and the provisions of 28 U.S. Code 1652, the federal courts in Ohio must follow Ohio's immunity to suit under its own Constitution (Constitution of the State of Ohio, Article I, Sec. 16) and its own case law.

Respondent Governor James Rhodes also refers to and adopts the argument with respect to diversity jurisdiction contained in the Brief on the Merits filed in this Court by the other Respondents.

Brief mention must be made of the contention in the complaints below that the State of Ohio had waived sovereign immunity by enactment of Sec. 5923.37, Ohio Revised Code.

Respondent Governor James Rhodes was not encompassed by the language of the statute as he is not a "member of the organized militia—ordered to duty by state authority during a time of public danger", but was, instead, the constitutionally appointed commander-in-chief of the organized militia and by virtue thereof, the arm of the state in summoning it to duty.

The *Krause-Miller* brief is intemperate in tone and marred by intrusions of so-called "facts" that, if they exist at all, are extraneous to the record. Such allegations

are undocumented, unsworn, and, but for the experience of the members of this Honorable Court, could be considered inflammatory.

Both the district court and the majority in the Sixth Circuit recognized that allegations in all the complaints were extravagant and conclusionary, and that they did not square with facts judicially noticed. In this Court, the *Scheuer* brief has retreated somewhat from the extravagances of the *Scheuer* complaint, but the *Krause-Miller* brief has achieved a new level of passion that leaves the *Krause* and *Miller* complaints looking insipid by contrast. A fair sample of the Krause-Miller language is this excerpt (in bold face type) taken from page 59 of the *Krause-Miller* brief:

> "Petitioners urge upon this court that the atmosphere and climate of May 4, 1970, was rife with political passion. The Governor, on the night prior to the shooting, held a public press conference in which extreme and intemperate statements were made by him on the scene of Kent, Ohio, in the presence and knowledge of the generals and troops. The Governor was personally present in command of these troops, working them up to a passioned frenzy in order, as petitioners contend, to achieve his personal political goals. Petitioners have alleged in substance, that the actions of this Governor, including the various orders he gave personally at the scene and elsewhere, individually and in conspiracy with others, directly resulted in the deaths of four innocent students. Petitioners state unabashedly that the Governor was dishonest in his motives and unconstitutional in his actions. The Civil Rights Act was designed to reach this extreme kind of unconstitutional violation. Nothing could be more essential to the individual in the protection of his constitutional rights than his right to life—particularly where the use of military forces is involved. This court cannot resolve the issues regarding executive immunity, which are

premised upon policy considerations, without reference to the factual context in which this tragedy occurred. (Kr. Br. 59-60.)

The *Krause-Miller* brief also attacks the proclamations attached to the Motions to Dismiss filed by Respondent Governor James Rhodes and purports to find the proclamation of April 29, 1970, to encompass only disorders arising from wild-cat strikes in the truck transportation industry. Careful readers will note that the reference to the problems in the truck transportation industry occur only in the "whereas" clauses, which introduce the Governor's order. The "order" part of the proclamation makes crystal clear that Respondent Governor James Rhodes ordered into active service "such personnel and units of the militia as may be designated by the Adjutant General to maintain peace and order and to protect life and property throughout the State of Ohio." (App. 30) The supplementary proclamation issued on May 5, 1970, discloses that on April 29, prior to the issuance of the proclamation of the same date, Respondent Governor James Rhodes, in the exercise of his constitutional office as Commander-in-Chief, by verbal orders issued to the Adjutant General, directed the call-up of

> "such units of the Ohio National Guard as in his judgment might be necessary or desirable to meet disorders and threatened disorders relating to wild-cat strikes in the truck transportation industry and to meet disorders or threatened disorders on campuses of Ohio State University in Franklin County and campuses of other state-assisted universities." (App. 32.) The May 5 proclamation further explains that "pursuant to the verbal orders aforementioned, the Adjutant General of Ohio called to active service units of the Ohio National Guard and assigned them variously to service in the City of Kent and on the campus of

Kent State University in Portage County, and on the campus of Ohio State University in Franklin County, in addition to divers specific assignments related to restoration of order in the truck transportation industry." (App. 32; text corrected to follow the original on file in the Office of Secretary of State of Ohio.)

The obvious conclusion to be drawn from the fact that a supplementary proclamation was issued to flesh out the first is that, to avoid exacerbating campus turmoil (by students and campus hangers-on), Governor Rhodes prudently gave the Adjutant General the authority he needed to meet threatened disorders, but did not, at the same time, by specific reference to Kent State, give an excuse to trouble-makers to increase their efforts to foment action in the streets. Both proclamations were from the hand of Respondent Governor James Rhodes, who, at the start of his second term, bound himself by his oath of office to support the Constitution of the United States and the Constitution of the State of Ohio, and faithfully to execute the laws.

The *Krause-Miller* brief further seeks to show, by picking words out of context, that the April 29, 1970 proclamation did not follow the language of §5923.22 of the Ohio Revised Code, which defines the occasions for use of the Ohio National Guard. If counsel will but look, and read the relevant words, separated from compound phrases, in the order in which written, counsel will see that all of the words required by Section 5923.22, O.R.C., are there:

> "WHEREAS, in northeastern Ohio[4], * * * and in other parts of Ohio * * * there exist unlawful assemblies and * * * bodies of men acting with intent to commit felony and to do violence to persons or property in disregard of the laws of the State of Ohio and the United States of America * * *."

4. Portage County is in northeastern Ohio.

The April 29, 1970 proclamation of Respondent Governor James Rhodes was prudently drawn to have the necessary legal consequences (including "to prevent a riot or insurrection"), to reassure and calm the citizenry, and to avoid increasing the anger and threat of any existing disorders.

If their position were better supported by reason and logic, the authors of the *Krause-Miller* brief would not feel impelled to shout so loudly and to berate so unmercifully. Understanding this, Respondent Governor James Rhodes does not formally invoke action by this Court under its Rule 40(5), although most of pages 59-65 of the *Krause-Miller* brief offend against its prohibitions.

The *Krause-Miller* brief also seeks to show that this Court's decisions in *Moyer v. Peabody*, 212 U.S. 78 (1909) and *Sterling v. Constantin*, 287 U.S. 378 (1932) are distinguishable and therefore inappropriate as precedents. *Moyer*, like the instant case, was an action brought under the Civil Rights Act to recover damages from a former Governor of Colorado for an asserted trespass. It is discussed, *supra*, in connection with the *Scheuer* brief.

The *Krause-Miller* brief would distinguish the *Moyer* case on its facts, specifically, that in *Moyer*, a state of insurrection existed and that the Governor of Colorado acted "in good faith." The asserted grounds of distinction are of no significance. First, there is no requirement that the Governor of Ohio be faced by insurrection before he can call up the Ohio National Guard. With the relevant portions in italics, §5923.21 of the Ohio Revised Code reads as follows:

> "*The organized militia may be ordered by the governor to aid the civil authorities to supress or prevent riot or insurrection*, or to repel or prevent invasion, and shall be called into service in all cases before the unorganized militia."

In addition, §5923.22 of the Ohio Revised Code, provides in relevant part:

> "When there is a tumult, riot, mob, or body of men acting together with intent to commit a felony, or to do or to offer violence to person or property, or by force and violence break or resist the laws of the state, the commander-in-chief may issue a call to the commanding officer of any organization or unit of the organized militia, to order his command or part thereof, describing it, to be and appear, at a time and place therein specified, to act in aid of the civil authorities. * * *"

The Governor of Ohio also has power, pursuant to §5923.21 of the Ohio Revised Code, to order the Ohio National Guard to execute the laws and to keep the peace in a designated area. This was done by his proclamation of April 29, 1970. It was filed with the district court as an attachment to the Motion to Dismiss in each of the cases.

In Part I of this Argument, Respondent Governor James Rhodes has dealt with the contention that on his Motions to Dismiss, under the facts of these cases, the district court was under no obligation to take the extravagant and unbelievable allegations of the complaints as true. Such unbelievable allegations do nothing to rebut the presumption of validity and good faith that inheres in an official act by the chief executive of a state within the scope of his office as defined by the Constitution and laws of his state in the absence of any showing that he has lost his powers through impeachment and removal from office.

In *Sterling v. Constantin*, 287 U.S. 378 (1932), this Court dismissed an appeal from an order enjoining the Governor of Texas from using the National Guard to enforce oil production quotas, but in so doing, referred to and approved *Moyer v. Peabody, supra*, in these words (Chief Justice Hughes, at page 399):

> "By virtue of his duty to 'cause the laws to be faithfully executed,' the Executive is appropriately vested with the discretion to determine whether an exigency requiring military aid for that purpose has arisen. His decision to that effect is conclusive."

Chief Justice Hughes then carefully distinguished the Governor's executive immunity, acknowledged when he calls out the National Guard and acts to suppress disorders and breaches of the peace from the case before him in which the Governor of Texas sought to use troops to regulate the production of oil. (Pages 401, 402.)

III. UNDER THE ELEVENTH AMENDMENT OF THE UNITED STATES CONSTITUTION, THE DISTRICT COURT LACKED JURISDICTION OF THE SUBJECT MATTER OF THE KRAUSE, MILLER AND SCHEUER COMPLAINTS.

It should be observed at the outset that the asserted violations of 42 U.S.C., §1983, are set forth in each of the complaints below as giving rise to a claim for payment of money to the Administrators of the respective estates of the decedents whose civil rights are claimed to have been violated. The amounts demanded, both individually and jointly from Respondent Governor James A. Rhodes, aggregate $4,000,000.00 in compensatory damages and $7,000,000.00, plus such additional amount as the Court might find appropriate in the *Scheuer* case, as punitive damages. The emphasis in the three complaints, then, is on punishment.

It also should be noted at the outset that each of the complaints is titled as one against Respondent Rhodes in his official capacity. The *Scheuer* complaint sued "James Rhodes, Governor of the State of Ohio." The *Krause* complaint sued "Governor James Rhodes, Governor of the State of Ohio, et al." The *Miller* complaint went straight down the middle and sued, "James Rhodes,

individually and as Governor of the State of Ohio—." Thus, two of the complainants below were sure, and one was half-sure, that his action was properly brought against the Governor of the State of Ohio, the Chief Executive of the State, and the official who, by force of the Ohio Constitution, is Commander-in-Chief of the Ohio National Guard.[5]

In the district court, Respondent Rhodes, by his motions to dismiss in the *Krause, Miller* and *Scheuer* cases, raised the question that the court lacked jurisdiction of the subject matter of each action. Similar motions were filed in behalf of the other respondents. Thus, the issue of Eleventh Amendment immunity has been asserted throughout this litigation and is again asserted by all respondents in this Court. Respondent Rhodes refers to and adopts the argument on this issue presented in the separate brief filed by Charles E. Brown, Robert F. Howarth, Jr., and William W. Johnston for the other defendants-respondents herein. That brief develops in detail the doctrine of sovereign immunity as applied to the facts in these cases. It stresses and documents that the immunity of a state to suit by citizens of another state cannot be by-passed by naming personal party-defendants when the action essentially affects the state. While it must be acknowledged that this Court has, on occasion, appeared to depart from this doctrine, it seems never to have done so in any action where the relief sought would diminish the revenues of the state or interfere with the exercise of any essential state government function on a par with the protection of its citizens against disorder, violence, and riot.

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5. Article III, §10, Const. of the State of Ohio: "He [the Governor] shall be Commander-in-Chief of the military and naval forces of the State, except when they shall be called into the service of the United States."

Counsel for the complainants below have placed great reliance on *Ex Parte Young*, 209 U.S. 123 (1908), with the *Krause-Miller* brief interpreting it as holding that the immunity of a state provided in the Eleventh Amendment does not extend to a state official charged with violating the Federal Constitutional Rights of citizens. However, *Ex Parte Young* lays down a principle so much narrower than asserted that the Sixth Circuit Court of Appeals correctly found the case to be "inapposite". (Sch. Pet. 12a.) What *Ex Parte Young* stands for is that

> "* * * individuals who, as officers of the state, are clothed with some duty in regard to the enforcement of the laws of the state, and who threaten and who are about to commence proceedings, either of a civil or criminal nature, to enforce against parties affected an unconstitutional act, violating the Federal Constitution, may be enjoined by a Federal Court of equity from such action." *Ex Parte Young*, 209 U.S. 123 at 155.

As Chief Judge Weick observed in the Court of Appeals opinion below, "*Ex Parte Young* — was an action for injunction —. Our case, on the other hand, is an action for damages and also involves the question whether the Federal Courts should interfere with the performance by the state's chief executive of his highest duty to suppress riots or insurrections and protect the public." (Sch. Pet. 12)

The *Scheuer* argument with respect to Eleventh Amendment immunity begins by asserting that the Eleventh Amendment has no role in suits seeking damages from persons who also happen to be state officials. That glosses over the threshold question of whether the act claimed to have given rise to a right to damages was a *personal* act of an official or an *official* act. Appointing a department head, or an adjutant general or calling out the National Guard cannot be a personal act. It can only be an official act.

The *Scheuer* argument also contends that a suit for money damages for abuse of office is possible under 42 U.S.C., §1983, only because the holding of a governmental office is requisite to supply the ingredient of "state action" thereby turning conduct merely tortious into deprivation of constitutional right. The point is not made that easily, for it pays too little attention to the force of Sec. 1983's words, "under color of any statute, — custom or usage of any state —". Given the ordinary meaning of the words, that phrase requires that the person sought to be charged shall have *pretended* to draw his authority to act from the statute, custom or usage. Thus, there could clearly be a cause of action under §1983, where an imposter, *pretending* to be a state officer, put forces in motion that deprived a complainant of some federally-protected Constitutional right. Similarly, a governor who had been advised by his Attorney General that an act of the legislature was unconstitutional would have difficulty in explaining that he was not *pretending* to act with proper authority in enforcing the act. It is this second category toward which the complaints below were directed in their extravagant and unbelievable allegations that Respondent Rhodes intentionally, wantonly and recklessly ordered National Guard troops to shoot and kill innocent students. However, as was pointed out in Part I of this Argument, the Court was not bound to accept or believe such allegations when, of its own knowledge, it knew that the Governor is sworn to uphold the Constitutions of the United States and of Ohio and that he had facts before him on which, acting in good faith, he could make the judgments and issue the orders complained of in the District Court.

The *Scheuer* brief further contends that the Eleventh Amendment today has to be regarded as modified by the Fourteenth Amendment so as to permit redress against an officer of a state for deprivation of constitutional

rights, and that even if no remedy has been provided, the Court, if it feels a sufficient sense of outrage, can invent one. Such a sense of outrage was felt in *Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics*, 403 U.S. 388 (1971). Justice Brennan wrote the decision for five members of the Court, and Justice Harlan concurred. Chief Justice Burger dissented as did Justice Black and Justice Blackmun. Notable is the fact that the case involved a claimed deprivation of federally-protected rights by officers of the Federal government. The case in no way touches the doctrine of federalism nor does it in any way involve the Eleventh Amendment. Moreover, this Court during its most recent term restated the continuing validity of Eleventh Amendment (sovereign) immunity.[6]

The main argument of the *Krause-Miller* brief on Eleventh Amendment immunity, is that this Court has, in the past, held that a suit against state officials is not a suit against the state and therefore is not prohibited by the Eleventh Amendment and, further, that if under the facts of the instant case, it still should be deemed directed against the state, relief should be granted because the Fourteenth Amendment cannot be negated by the Eleventh Amendment. Further, the *Krause-Miller* brief asserted that Justice Brennan has shown how to harmonize the Eleventh Amendment and the Fourteenth Amendment in *Perez v. Ledesma*, 401 U.S. 82 (1971) (Kr. Br. 38); that Sixth Circuit Judge O'Sullivan just doesn't like the Civil Rights Act (Kr. Br. 39); that the State of Ohio has immunized itself against suit in its own courts (Kr. Br. 40); that the actions of the courts below effectively destroy 42 U.S.C. §1983 (Kr. Br. 45);

6. A state is immune to suit even by its own citizens, absent consent to be sued. *Employees v. Missouri Public Health Dept.* 36 L. Ed. 2d 251 (1973).

that judgment for the complaints below would not touch the state Treasury (Kr. Br. 51) and that in fact, many of the defendants-respondents are no longer officers of the state (Kr. Br. 40).

The *Krause-Miller* argument on the issue of Eleventh Amendment immunity is answered in detail in the brief of the other Respondents herein. It cannot escape notice that the *Krause-Miller* brief seeks to swell the impact of its argument by use of words heavily laden with emotion. Consider, for example, this selection from the Eleventh Amendment argument:

> "If state officials, acting under color of state law, can individually and in conspiracy, illegally, wantonly, intentionally, shoot and kill a student on a college campus without any justification whatsoever, and thereafter be entitled to claim immunity from any redress in a federal court for the wrong allegedly committed, then the guarantees of due process and equal protection in the Fourteenth Amendment are meaningless and inoperative statements which exist only on a piece of paper." (Kr. Br. 53).

It seems pertinent to observe again that the "victims" are deceased and the claims are for money sought both as compensatory and punitive damages. Moreover, the *Krause-Miller* argument ignores the customary way in which the State of Ohio deals with moral claims. That is through filing and processing a claim through the Sundry Claims Board, and obtaining its inclusion and passage in a Sundry Claims Bill. Such an approach, however, would not serve one of the manifest purposes of this litigation, one which appears to be much stressed in some of the briefs *amici curiae* filed herein, namely, to change the relationships between the federal government and the states by opening a clear path for civil rights actions under the aegis of 42 U.S.C., §1983.

The *Krause-Miller* brief concludes its argument against recognizing the applicability of Eleventh Amendment immunity to these cases by implying that this Court would be false to its traditions if it did not equate the instant cases with landmark civil rights decisions of recent decades, and, if necessary, "fashion a remedy". Such a suggestion is particularly dangerous when it invites this Court both to assume legislative functions and to make frontal attack upon the doctrine of federalism. Surely this Court will see, as the courts below have seen, that preserving public order within a state is an essential governmental function, that acts in furtherance of and directed toward such preservation of public order are official acts, and, being official, are acts of the state and have the protection of Eleventh Amendment immunity.

The *Krause-Miller* brief quotes at length from *Sterling v. Constantin* without indicating the distinct difference in facts between that case and the *Krause-Miller-Scheuer* cases. In *Sterling*, the Governor had declared martial law and superseded the function of civil authorities so far as they related to administration of oil production quotas. In the instant cases, the National Guard was ordered to *aid* civil authorities, not to displace them. The brief *amicus curia*, tendered by David E. Engdahl, Esq., in behalf of various church groups, also urges that *Sterling v. Constantin* reinterpreted *Moyer v. Peabody* and limited the executive immunity of the governor to acts "which are judicially found in retrospect to have been directly related to a lawful mission * * *". However, Chief Justice Hughes, in *Sterling* (at page 400), in refering to the *Moyer* case, said:

> "In that case, it appeared that the action of the Governor had direct relation to the subduing of the insurrection by the temporary detention of one believed to be a participant, and the general language of the

opinion must be taken in connection with the point actually decided."

The same admonition is relevant to those who would extend the ruling in *Sterling v. Constantin* and urge that it reverses *Moyer*. The point of the case was described by Chief Justice Hughes:

> "Fundamentally, the question here is not of the power of the Governor to proclaim that a state of insurrection, of tumult, or riot, or breach of the peace exists, and that it is necessary to call military force to the aid of the civil power. Nor does the question relate to the quelling of disturbances and the overcoming of unlawful resistance to civil authority. The question before us is simply with respect to the Governor's attempt to regulate by executive order the lawful use of complainants' properties in the production of oil." *Sterling v. Constantin*, 287 U.S. 378, 401 (1932).

The *Krause-Miller* brief, also, by misconstruing the sense of one of Judge Weick's pronouncements, misrepresents the import of the Sixth Circuit majority's discussion of the doctrines of legislative and judicial immunity, companions to executive immunity. The *Krause-Miller* brief quotes and expands upon Judge Weick's words as follows:

> " 'and since the courts have granted to themselves absolute immunity, it would seem incongruous for them *not to extend the same privilege* to the executive.' (Emphasis added.)"
> "Thus it would appear that the logic of the lower Court's reasoning leads to an 'extension' of the immunity doctrine to the executive. This Court, for several reasons, should not affirm such an 'arbitrary' extension." (Kr. Br. 70.)
> "Moreover, such an 'extension of immunity to the executive would leave a citizen without any redress for violation of federal constitutional rights —'." (Kr. Br. 70.)

"In summary, there is absolutely no justification for this Court to extend the legislative and judicial immunities under the Civil Rights Act to include the executive branch of the government." (Kr. Br. 75.)

A reading of Judge Weick's words in more complete context makes clear that he did not use the word "extend" to signify "enlarge the scope of" but only in the sense of "recognize", "acknowledge", or "concede":

"Although occasionally both legislators and judges have been charged with depriving individuals of their constitutional rights, they have unquestioned immunity from suit. *Gregoire v. Biddle, supra*, and *Barr v. Matteo, supra*, applied the immunity to the Executive Department for the same reasons that it was extended to legislators and judges. The Executive Department is charged with the duty of protecting not only the other two departments of government, but also the general public from domestic as well as foreign enemies. Such protection is the highest duty the Executive Department is obligated to perform. [Footnote: As well stated by Mr. Justice White, 'The most basic function of any government is to provide for the security of the individual and of his property.' *Miranda v. Arizona*, 384 U.S. 436, 539 (1966), White, J. dissenting.]

It would not be conducive to good government to require the Chief Executive of either the nation or the state to defend himself in court, in a multitude of protracted actions, because he called out troops to suppress riots or disorders which resulted in injury. It would surely take a hardy executive to exercise his discretion by calling out troops to suppress a riot or insurrection, if he knew that in so doing the wisdom of his action could later be challenged in the courts. And since the courts have granted to themselves absolute immunity, it would seem incongruous for them not to extend [concede] the same privilege to the Executive."

"To place a straight-jacket on the state's Chief Executive in times of emergency so that he could not freely exercise his discretion, would indeed stop the state

government 'in its tracks'. *Dugan v. Rank, supra*, at 621; *Larson v. Domestic & Foreign Corp.*, 337 U.S. 682 at 704 (1949); *Ogletree v. McNamara*, 449 F. 2d 93 (6th Cir. 1971)."

In 1959, this Court decided *Barr v. Matteo*, 360 U.S. 564, 3 L. Ed. 2d, 1434, 79 Sup.Ct. 1335. The case was one in which the Director of the Office of Rent Stabilization was sued for libel for statements in a press release. The majority opinion was written by Justice Harlan who cited as precedent *Spalding v. Vilas*, 161 U.S. 483, 40 L. Ed. 780, 16 Sup. Ct. 631, and *Gregoire v. Biddle* (C.A. 2 N. Y.) 177 Fed. 2d 579, 581. In the latter case, Judge Learned Hand pointed out that an official who uses his powers to injure another should not escape liability but that it is impossible to know whether a claim for money damages is well founded until the case has been tried, so that

> "to submit all officials, the innocent as well as the guilty, to the burden of a trial and to the inevitable danger of its outcome, would dampen the ardor of all but the most resolute, or the most irresponsible, in the unflinching discharge of their duties. Again and again, the public interest calls for action which may turn out to be founded on a mistake, in the face of which an official may later find himself hard put to it to satisfy a jury of his good faith. There must indeed be means of punishing public officers who have been truant to their duties, but that is quite another matter from exposing such as have been honestly mistaken to suit by anyone who has suffered from their errors. * * * what is meant by saying that the officer must be acting within his power cannot be more than that the occasion must be such as would have justified the act, if he had been using his power for any of the purposes on whose account it was vested in him —." 177 Fed. 2d 579, 581.

Following his reference to Judge Learned Hand's opinion, Justice Harlan considered the scope of executive

immunity and concluded that absolute immunity, usually thought of as pertaining only to executive officers of top rank, is more properly related to the scope of the official's responsibilities, duties and discretion. He wrote:

> "To be sure, the occasions upon which the acts of a head of an executive department will be protected by the privilege are doubtless far broader than in the case of an officer with less sweeping functions. But that is because the higher the post, the broader the range of responsibilities and the wider the scope of discretion, it entails." *Barr v. Matteo*, 360 U.S. 564, 573.

The *Krause-Miller* brief spends much time and effort seeking to demonstrate that *Barr v. Matteo, supra*, and *Gregoire v. Biddle, supra*, were poorly reasoned in the first place, are replete with dicta, and can have no applicability to the instant cases because neither *Barr* nor *Gregoire* was brought under the Civil Rights Act. The reasoning of the cases nevertheless, seem sound.

A Governor of Ohio, under the law in force in 1970 and currently in force, clearly has the responsibility and the discretion to determine when it is appropriate to call the National Guard to aid civil authorities. He uses troops trained and equipped in accordance with the requirements of federal law. He leaves tactical decisions as to choice of units and their deployment to the judgment of the Adjutant General and the Assistant Adjutant General, both of whom he has appointed, and both of whom have been trained pursuant to federal directives. If, despite the built-in precautions, a mistake is made (a point on which consensus is often impossible to reach), the courts should not second-guess the Executive decision. Where civil rights are involved and life is lost, particularly young life, the impulse is strong to adopt a rationale that will match the emotional need for someone in society

to make amends for society as a whole. Unfortunately, in an age that has left behind animal sacrifices to the gods, symbolic expiation can be accomplished only at the cost of counter injury to persons or to institutions. On balance, it seems wiser to protect our institutions of government and the frail mortals who make government work and to leave moral claims to be settled through the workable, though not completely satisfactory, procedure of sundry claims processed through the mechanisms provided therefor in the Executive and Legislative Branches.

IV. THE KRAUSE, MILLER, AND SCHEUER COMPLAINTS, TO THE EXTENT THEY CHARGE IMPROPER TRAINING, ARMING AND PROCEDURES OF THE OHIO NATIONAL GUARD, RAISE POLITICAL QUESTIONS THAT ARE NOT JUSTICIABLE.

After the filing of the Petitions for Certiorari herein, this Court, on June 21, 1973, decided *Gilligan v. Morgan*, ____ U.S. ____, 37 L. Ed. 2d 407, 93 Sup. Ct. ___. The action, brought by students at Kent State University, among other things, asked for injunctive relief to prevent the Ohio National Guard, in the future, from violating the constitutional rights of the plaintiffs and members of their class. The complaint was dismissed by the District Court for failure to state a claim upon which relief could be granted. The Court of Appeals for the Sixth Circuit affirmed the dismissal with respect to most of the relief sought, but remanded the case to the District Court with directions to resolve the following question:

> "Was there and is there a pattern of training, weaponry and orders in the Ohio National Guard which singly or together require or make inevitable the use of fatal force in suppressing civilian disorders when the total circumstances at the critical time are such that non-

lethal force would suffice to restore order and the use of lethal force is not reasonably necessary?:

This Court granted certiorari to review the action of the Court of Appeals. Between the time of the filing of the complaint and the argument in this Court, the terms of all the officers expired, all the students who were plaintiffs left school, and the Ohio National Guard adopted new "use-of-force" rules and installed new training for civil disorder control.

Chief Justice Burger wrote an opinion expressing the view of five members of the Court, declining to use mootness as the basis of their decision. The majority then ruled that the Constitution of the United States empowered Congress to provide for organizing, arming and disciplining the militia, reserving certain responsibilities to the state; that Congress has authorized the President to prescribe regulations governing the organization and discipline of the National Guard; and that the relief sought in the action is of such nature as to render the claims and proposed issues on remand non-justiciable. Justices Blackmun and Powell concurred on the grounds that the case presented inappropriate subject matter for judicial consideration. Justices Douglas, Brennan, Stewart and Mashall joined in asserting that the case should be dismissed as moot.

Although the relief sought in *Gilligan v. Morgan, et al.* was prospective in nature, it called for the same sort of judicial determination sought retroactively in the instant cases. It is submitted, therefore, that to the extent the instant cases require an evaluation of training, arming and procedures of the Ohio National Guard, they raise political questions that are not justiciable.

The *Scheuer* brief herein seeks to narrow the scope of the opinion in *Gilligan v. Morgan* and to show that it has

no application to an action for damages. That was not decided in the case. Being scrupulously correct, the Court simply observed in *Gilligan* that the case was not one in which damages were sought.

V. THE ALLEGATIONS IN THE KRAUSE AND MILLER COMPLAINTS THAT TRAINING, ARMING AND PROCEDURES OF THE OHIO NATIONAL GUARD WERE IMPROPER INDISPENSABLY REQUIRE JOINDER OF THE UNTED STATES OF AMERICA AS A PARTY-DEFENDANT.

Speaking for the majority in the Sixth Circuit consideration of these cases, Judge Weick stated:

> "It would appear that the United States was a necessary party to the determination of the issues as it was involved in the training of the National Guard and their use of weaponry. Failure to join an indispensable party requires dismissal of the action, Rules 12b and 19, Fed. R. Civ. P. Any decision rendered by the District Court relative to the training and weaponry of the Guard would require action to be taken by both state and federal governments. To require such action to be taken is beyond the jurisdiction of the Court. The United States has not consented to be sued." (Sch. Pet. 19.)

In the view of Petitioners, Judge Weick wrongly concluded that because of the involvement of the United States in the training of the National Guard, the United States was required to be named a defendant. Petitioners' theory is that inasmuch as Petitioners did not state in their complaints that the United States government or federal officials were involved, as stated by Judge Weick, there is no way to arrive at the conclusion that they were in fact so involved. Such a notion ignores Article I, Sec. 8,

Clause 16, of the United States Constitution, which, after providing that Congress shall have power to provide for the organizing, arming, disciplining and governing of the militia, reserved to the states the appointment of officers and the "authority of training the Militia according to the discipline prescribed by Congress." It likewise ignores relevant provisions of Title 32, United States Code: Section 108, providing that a state that does not comply with Title 32 shall lose its National Guard money; Section 110, providing that the President shall be the source of regulations and orders to organize, discipline and govern the National Guard; Section 501, providing that the discipline and training of the Army National Guard shall conform to that of the Army and the discipline of the Air National Guard to that of the Air Force.

Rule 19(a), Fed. R. Civ. P., states in pertinent part:

> "A person * * * shall be joined as a party in the action if * * * he claims an interest relating to the subject of the action and is so situated that the disposition of the action in his absence may * * * leave any of the persons already parties subject to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations by reason of his claimed interest. If he has not been so joined, the Court shall order that he be made a party."

Rule 19(b) provides in pertinent part:

> "If a person as described * * * cannot be made a party, the court shall determine whether in equity and good conscience the action * * * should be dismissed, the absent person being thus regarded as indispensable. * * *"

The provisions of the United States Constitution, Title 32 of the United States Code, and the Federal Rules of Civil Procedure are all matters of which the court takes

judicial notice. The court likewise notes that the United States government, which is so intricately interwoven in the training, arming and discipline of the Guard, is indispensably a party and has not consented to be sued. Under the circumstances, Judge Weick reached the only possible conclusion, namely, he required dismissal of the actions.

When Petitioners assert that "any bar to this action premised upon the failure of the United States to consent to suit violates the due process and equal protection clauses of the XIV Amendment", they are arguing in a circle. What they are saying is that it is unconstitutional under the XIV Amendment for the sovereignty created by the United States Constitution to possess one of the attributes of sovereignty, namely, an immunity to suit in its own courts.

CONCLUSION

For the reasons herein given, this Court should affirm the judgment of the United States Court of Appeals for the Sixth Circuit that, in turn, affirmed the dismissal of the *Krause*, *Miller* and *Scheuer* complaints by the United States District Court for the Northern District of Ohio, Eastern Division.

Respectfully submitted,

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